

EXHIBIT A

15:47:53

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UNITED STATES DISTRICT COURT

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WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA) 19CR227

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vs.

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Buffalo, New York

JOSEPH BONGIOVANNI, & PETER

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GERACE, JR.)

June 29, 2021

Defendant

1:15 p.m.

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Oral Argument

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Transcribed from an Electronic Recording Device

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TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL J. ROEMER

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UNITED STATES MAGISTRATE JUDGE

13

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1 USA VS. J. BONGIOVANNI & P. GERACE, JR.

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THE CLERK: United States District Court for
the Western District of New York is now in session. The
Honorable Michael J. Roemer presiding.

We're here on the matter of the United
States versus Bongiovanni and Gerace for oral argument.

Counsel for the government, please state
your name for the record.

MR. TRIPI: Joseph Tripi and Brendan
Cullinane for the United States. Good afternoon, your
Honor.

THE CLERK: Thank you. Counsel for
Defendant Gerace.

MR. LATONA: Joe LaTona with co-counsel, Mr.
Daniels. And the record should reflect that Mr. Gerace

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15:48:51 2 is here in court.

15:48:52 3 MAGISTRATE JUDGE ROEMER: And counsel for
15:48:55 4 Defendant Bongiovanni, please state your name for the
15:48:58 5 record.

15:48:58 6 MR. HARRINGTON: James Harrington and Jesse
15:49:01 7 Pyle for Mr. Bongiovanni. He is not here.

15:49:02 8 MAGISTRATE JUDGE ROEMER: You're waiving his
15:49:04 9 appearance?

15:49:05 10 MR. HARRINGTON: Yes, Judge.

15:49:05 11 MAGISTRATE JUDGE ROEMER: We're here for
15:49:06 12 oral argument for defendants' motions to unseal search
15:49:11 13 warrant applications. I have read the parties' papers.

15:49:14 14 Mr. LaTona, do you want to go ahead?

15:49:15 15 MR. LATONA: Yes, Judge. I want to
15:49:17 16 summarize, as you indicated, there is a lot in the
15:49:20 17 paperwork. Judge, what I want to do is address standing
15:49:23 18 with regard to Pharaohs, the gentlemen's club, and I
15:49:26 19 just want to read, this is paragraph four of the second
15:49:31 20 superseding indictment, document 89, sentence two, which
15:49:37 21 states: "Gerace is also the owner and principal operator
15:49:42 22 of Pharaohs Gentlemen Club located at 999 Aero Drive,
15:49:47 23 Cheektowaga."

15:49:50 24 One of the cases cited by the government and
15:49:53 25 by us, basically, the Gerena case out of the District of

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15:50:00 2 Connecticut basically said that when a defendant makes a
15:50:02 3 colorable claim of standing, he or she is entitled to a
15:50:08 4 hearing where the prosecution reasonably challenges
15:50:12 5 standing. As we pointed out in our Reply memo, quite
15:50:17 6 frankly, Judge, we were shocked that they would even
15:50:22 7 contest the issue of standing as to the gentlemen's
15:50:25 8 club, quite frankly. I don't want to get into the
15:50:28 9 criticism that the Judge in *Gerena* lodged in that
15:50:32 10 particular footnote, but I think he made it very clear
15:50:35 11 that when the government challenges standing, they must
15:50:39 12 reasonably do so. In order to have a full and complete
15:50:44 13 record for your Honor to issue a ruling, what I am
15:50:48 14 suggesting is that there be either a hearing at which
15:50:53 15 the prosecution must produce as exhibits, any testimony
15:50:59 16 or tangible item backing up that sentence out of the
15:51:04 17 indictment that I just read. Now, we're not out to find
15:51:09 18 witness' identities or anything else. You can redact
15:51:12 19 the name, you can redact out every single allegation by
15:51:16 20 that witness with the exception of what did that witness
15:51:19 21 testify regarding Mr. Gerace's ownership of Pharaohs,
15:51:25 22 his procurement of title of the land, and maybe, most
15:51:30 23 importantly, his involvement in the operations of
15:51:33 24 Pharaohs. That is on the one hand. It would be a
15:51:37 25 truncated hearing, basically, using redacted exhibits.

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15:51:40 2 I guess the flip side of it --

15:51:42 3 MAGISTRATE JUDGE ROEMER: Mr. LaTona, let's
15:51:44 4 assume he owns it and all that. Okay. He is the owner
15:51:48 5 of the business. And I don't know that he really owns
15:51:51 6 the building. I guess there is something going on that
15:51:54 7 he is going to get transfer of the title.

15:51:56 8 MR. LATONA: It's a land contract and he is
15:51:59 9 going to transfer that.

15:52:01 10 MAGISTRATE JUDGE ROEMER: Let's assume that
15:52:03 11 is all true. How is it -- is he the only one with the
15:52:05 12 key? Do a whole bunch of other people have access to
15:52:09 13 that? Do you keep your standing? Do you have a
15:52:12 14 reasonable expectation of privacy if 20 other people can
15:52:16 15 come and go as they want and that sort of thing?

15:52:18 16 MR. LATONA: Sure, Judge, because if you're
15:52:20 17 the one who controls who gets the keys, when they might
15:52:24 18 or might not have access, when you're controlling the
15:52:27 19 business, the business operation and basically telling
15:52:29 20 people what to do, okay, then you're in command here.

15:52:34 21 MAGISTRATE JUDGE ROEMER: Because the
15:52:37 22 building in general, at least, is open to the public.
15:52:41 23 You can go in in working hours.

15:52:44 24 MR. LATONA: Within certain hours.

15:52:45 25 MAGISTRATE JUDGE ROEMER: Usually when I see

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15:52:47 2 this, I see something like they seized records out of my
15:52:50 3 office. I'm the only one with a key to my office. They
15:52:54 4 are kept in a file cabinet and I'm the only one with a
15:52:57 5 key to the file cabinet, that sort of thing.

15:53:01 6 MR. LATONA: Because you're talking about an
15:53:03 7 employee, not someone who owns the property, owns the
15:53:13 8 business. I can understand that, and I know the
15:53:15 9 distinguishing feature that someone maybe as a corporate
15:53:19 10 executive, maybe he owns some stock, maybe he owns the
15:53:24 11 majority of stock where the government ends up taking
15:53:27 12 things out of someone else's office or looking at
15:53:30 13 someone else's laptop. That is the difference. When
15:53:34 14 you're in control of the premises, you own the building,
15:53:44 15 you know, basically you're controlling who gets in, what
15:53:47 16 they are do doing while they were there, and you
15:53:50 17 regulate when members of the public are allowed to come
15:53:53 18 in there. One of the exhibits that Mr. Daniels had in
15:53:58 19 his motion would be the employee access door, which
15:54:01 20 would be where Mr. Gerace enters and exits pursuant to
15:54:07 21 Judge Sinatra's order giving him limited access to the
15:54:12 22 premises. I think for all concerned, whether we have a
15:54:15 23 truncated open hearing on it with redacted documents or
15:54:18 24 the flip side of it would be that the government should
15:54:22 25 provide to you for your in camera examination all of the

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15:54:24 2 evidence that was presented to that grand jury
15:54:27 3 underlying the sentence that I just read out of the
15:54:30 4 indictment. I think it has to happen one way or the
15:54:33 5 other so you have a full record with which to make your
15:54:37 6 decision. That is regarding standing. I don't know if
15:54:40 7 you want to let them respond or keep going.

15:54:44 8 MAGISTRATE JUDGE ROEMER: No, go ahead with
15:54:45 9 the rest.

15:54:46 10 MR. LATONA: Judge, we have received today a
15:54:48 11 redacted portion or a redacted application for the cell
15:54:52 12 phone which was seized. And Mr. Daniels and I are
15:54:59 13 reviewing it. And we may want to make some motion in
15:55:04 14 that regard. Going back to the initial warrants, they
15:55:07 15 were issued back in November of 2019, that is 18 months
15:55:10 16 ago. We submit to your Honor that it's very clear,
15:55:13 17 every day that goes by, on a daily basis, any rationale
15:55:19 18 for sealing evaporates. I think that is the lesson of
15:55:23 19 the cases. And, quite frankly, the one case that I
15:55:28 20 think really should be reviewed by your Honor, and I'm
15:55:33 21 sure you will, is the *Abuhamra* case, which came out of
15:55:36 22 this district. That was one --

15:55:40 23 MAGISTRATE JUDGE ROEMER: I'm very familiar
15:55:42 24 with that case.

15:55:42 25 MR. LATONA: I know, Judge. I presume at

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15:55:44 2 that time, you were working with that particular judge
15:55:47 3 here and what not. And I think that is basically a road
15:55:50 4 map as to any sort of ex parte type situation. And I
15:55:56 5 think the rules that the Second Circuit --

15:55:57 6 MAGISTRATE JUDGE ROEMER: They didn't really
15:55:59 7 deal with a search warrant, though. That dealt with ex
15:56:02 8 parte hearing regarding whether or not a defendant
15:56:04 9 should be released on bail pending sentencing, I
15:56:08 10 believe.

15:56:09 11 MR. LATONA: That's correct. But I think
15:56:10 12 the rationale is right on point.

15:56:11 13 MAGISTRATE JUDGE ROEMER: Okay.

15:56:12 14 MR. LATONA: And, in fact, in that case, if
15:56:19 15 I may, the Second Circuit talked about an in camera ex
15:56:27 16 parte stuff, and here is what they said. Once such
15:56:31 17 orders are executed, this is an order based on it,
15:56:35 18 however the ex parte submissions are generally unsealed
15:56:38 19 in the case of arrest and search warrants usually
15:56:42 20 immediately and parties whose liberties or property
15:56:45 21 interest are affected are afforded opportunities to
15:56:49 22 challenge the legality of the actions. And then it
15:56:52 23 cites to Federal Criminal Rule 12. So, they were
15:56:56 24 mindful in that regard. But some of the other
15:56:59 25 situations, Judge, is that with that amount of time, the

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15:57:04 2 government has had full opportunity to interview any
15:57:06 3 potential witnesses that they wanted. They certainly
15:57:09 4 made a determination and we've got enough to go to a
15:57:13 5 grand jury. And they indicted Mr. Gerace and had him
15:57:17 6 arrested.

15:57:18 7 One of the other issues, Judge, is the fact
15:57:20 8 that his ex-wife has basically outed herself as a grand
15:57:25 9 jury witness. And we've appended to our papers a
15:57:29 10 Buffalo News article, and also a Channel 2 excerpt from
15:57:33 11 TV indicating that she said that she was a grand jury
15:57:36 12 witness. We submit, respectfully, that any information
15:57:42 13 provided by her that led to the issuance of a search
15:57:45 14 warrant should be disclosed to us because she self outed
15:57:48 15 her position as a grand jury witness.

15:57:52 16 But, I think, getting back to *Abuhamra*,
15:57:54 17 Judge, is that the strong presumption against ex parte
15:57:58 18 submissions, the government must demonstrate on a
15:58:01 19 continuing basis and designate that material that
15:58:05 20 actually should be kept secret as it may compromise a
15:58:11 21 legitimate situation, that it has to be a situation,
15:58:16 22 *Abuhamra* even said, that they should have to provide the
15:58:19 23 defense with a summary of these various reasons and the
15:58:25 24 Court was obliged to scrutinize the reliability of this
15:58:29 25 ex parte information. And I think *Abuhamra* provides a

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15:58:32 2 good road map for this situation. Quite frankly, Judge,
15:58:39 3 unless there is a determination based on the submissions
15:58:42 4 to date, your Honor's inspection of the grand jury
15:58:45 5 materials or giving us a truncated hearing, we do need
15:58:50 6 some support of an evidentiary hearing. There are a
15:58:53 7 number of cases that we cited in the reply memo where
15:58:57 8 courts have conducted hearings, some in camera.

15:59:01 9 But the Ninth Circuit, in the *Napier*
15:59:05 10 decision that was initially cited by the prosecution,
15:59:07 11 what happened there was initially the government
15:59:10 12 released a redacted affidavit, the defense basically
15:59:14 13 said that is not enough, they actually had an open court
15:59:17 14 evidentiary hearing where the affiant testified,
15:59:21 15 apparently, under the scrutiny of the court, which
15:59:25 16 precluded certain inquiries into various matters so the
15:59:29 17 court was there to supervise it, so we feel we want to
15:59:34 18 press forward with a hearing regarding this continued
15:59:38 19 sealing that the government wants to pursue. I think
15:59:42 20 your decision in *Willson*, the *Kingsmen* case, I think was
15:59:48 21 very good insofar as you recognized options. No. 1,
15:59:52 22 redaction, a redacted search warrant application. And
15:59:56 23 you indicated another suggestion that would be
15:59:59 24 reasonable, an attorneys'-eyes-only, where only the
16:00:03 25 lawyers have the ability to review these materials.

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16:00:07 2 Now, we have a protective order in place. And,
16:00:11 3 basically, anything that we, the lawyers, get any
16:00:14 4 documentation, any of these applications, although we
16:00:18 5 can make a motion and we can refer to various things in
16:00:22 6 there, we may not attach as exhibits to our moving
16:00:26 7 papers the actual documents themselves, which is
16:00:30 8 basically the procedure that we had in the Chosen Few.

16:00:33 9 MAGISTRATE JUDGE ROEMER: But it's not
16:00:34 10 attorneys'-eyes-only right now, our current protective
16:00:38 11 order?

16:00:39 12 MR. LATONA: Yeah.

16:00:39 13 MR. TRIPI: It is not.

16:00:40 14 MR. LATONA: No, it's not.

16:00:41 15 MAGISTRATE JUDGE ROEMER: Yeah.

16:00:42 16 MR. LATONA: What it says in the protective
16:00:43 17 order is that if a suppression motion is advanced by the
16:00:47 18 defense, they may not attach, as exhibits to their
16:00:52 19 moving papers, the actual applications. But these are
16:00:57 20 the other alternatives.

16:00:58 21 MAGISTRATE JUDGE ROEMER: You're offering an
16:01:00 22 attorneys'-eyes-only alternative.

16:01:02 23 MR. LATONA: Absolutely. Sure, Judge, I
16:01:05 24 mean, absent the relief we're seeking, we can not
16:01:09 25 effectively represent Mr. Gerace and his Sixth Amendment

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16:01:13 2 right to effective counsel in our right. We'll be
16:01:24 3 abrogated.

16:01:25 4 MAGISTRATE JUDGE ROEMER: Okay. Is that
16:01:26 5 all?

16:01:26 6 MR. LATONA: Yes, your Honor.

16:01:27 7 MAGISTRATE JUDGE ROEMER: Mr. Harrington,
16:01:28 8 you want to add anything?

16:01:34 9 MR. HARRINGTON: Judge, as you know on the
16:01:41 10 papers, we're in a bit of a different situation because
16:01:44 11 we're talking about Mr. Bongiovanni's home and his own
16:01:49 12 phones. There is, apparently, some question raised by
16:01:52 13 Mr. Tripi regarding other phones. We're not seeking to
16:01:57 14 have the phones of his wife or son turned over to us.
16:02:00 15 We don't claim standing for those. We do claim
16:02:04 16 standing, obviously, for his own phone. Judge, unless
16:02:07 17 you have some questions, I don't understand why there is
16:02:10 18 an issue of standing with respect to somebody's home,
16:02:13 19 which is clearly what the Fourth Amendment is directly
16:02:17 20 for and for somebody's own personal cell phone. So I
16:02:24 21 think what we're talking about --

16:02:26 22 MAGISTRATE JUDGE ROEMER: Let me just make
16:02:28 23 sure I understand about the cell phone. As I recall
16:03:50 24 reading in the papers, there was a number of electronic
16:03:53 25 devices seized from his home, and I thought what the

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16:03:56 2 government was saying is he hadn't identified which
16:03:59 3 phone is his. Is that true or not true?

16:04:02 4 MR. HARRINGTON: I don't know that we
16:04:03 5 specifically identified it in there, Judge. It's easy
16:04:06 6 enough to do. And Mr. Tripi knows which phone it is
16:04:11 7 since the day that they executed the search warrant,
16:04:13 8 agents sat there with my client with the phone. They
16:04:16 9 know what phone we're talking about. It's one phone
16:04:18 10 that he used; he didn't use multiple.

16:04:20 11 MAGISTRATE JUDGE ROEMER: And you're not
16:04:21 12 claiming standing with regard to all of the other
16:04:25 13 electronic devices.

16:04:26 14 MR. HARRINGTON: We'll waive that. Excuse
16:04:27 15 me. We'll waive standing with respect to the phones of
16:04:30 16 his son or his wife. If the government wants us to
16:04:35 17 specify which ones those are, we'll be glad to do that.

16:04:38 18 MAGISTRATE JUDGE ROEMER: Okay.

16:04:39 19 MR. HARRINGTON: Okay. But, Judge, it seems
16:04:41 20 to me, what we're talking about here is what the remedy
16:04:46 21 is for the Court if the Court accepts the
16:04:48 22 representations of the government about why this should
16:04:51 23 not be turned over to us. And as I understand the
16:04:58 24 government, Mr. Tripi and I have talked about it, he is
16:05:01 25 claiming, one, that there may be some, apparently,

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16:05:03 2 danger to somebody. I don't know what that is. This is
16:05:06 3 not a danger case. And number two, it may reveal some
16:05:10 4 sources or methods because there are still ongoing
16:05:13 5 investigations. And, I know that one of the remedies
16:05:19 6 that is talked about is for the Court to get the
16:05:23 7 application for the search warrant and read it in camera
16:05:26 8 and then make a determination as to what can be turned
16:05:29 9 over to us. And I ask the simple question to you is
16:05:33 10 what are you going to do when you read it? I'm not
16:05:36 11 asking you to say anything now. You are a magistrate
16:05:41 12 judge, two other magistrate judges equal to you have
16:05:44 13 issued the search warrants in this case, and, obviously,
16:05:47 14 they looked at the search warrant the same as you do.
16:05:50 15 The problem here is it's not just what's on the face of
16:05:57 16 the warrant that can be part of the application to
16:05:59 17 suppress. There is obviously, in many cases, there were
16:06:05 18 *Franks* issues, good-faith material misrepresentations
16:06:10 19 and whatever. We have reasons to believe, based upon
16:06:13 20 our investigation, that there may well be potential
16:06:17 21 motions that we could bring to suppress the warrants
16:06:19 22 based upon the conduct of the government in the past.
16:06:22 23 It may be that we get the applications and make a
16:06:25 24 determination that we would not pursue that. But in
16:06:28 25 order to make that determination, we have to have that

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16:06:32 2 information. And the other problem and this is a --
16:06:39 3 this is the ongoing problem of practicing in this court
16:06:43 4 where as time goes by, every fundamental right and every
16:06:50 5 procedural right we have gets whittled away more and
16:06:55 6 more. So the government comes to you with an
16:06:57 7 application for a search warrant. They write it. You
16:07:00 8 don't write it. The defense doesn't write it. They can
16:07:04 9 write applications for search warrants now relying on
16:07:07 10 the rationale they use now so applications for search
16:07:11 11 warrants will never be turned over to defense counsel if
16:07:14 12 they write them the right way. And it seems to me there
16:07:18 13 is a penalty they have to pay if they try to make the
16:07:23 14 claims over and over again when they are directly in
16:07:27 15 confrontation with fundamental rights under the Fourth
16:07:30 16 Amendment. And if they want to write things like that
16:07:34 17 about other investigations or something they are afraid
16:07:38 18 of happening, there are many ways you could do it.
16:07:41 19 Either a separate sealed affidavit or something that
16:07:45 20 protects the defendant's right to get as much
16:07:47 21 information as he or she can to protect their own rights
16:07:51 22 with regard to search warrants. And if the government
16:07:54 23 does not choose to do that, that's on them. If they
16:07:57 24 don't want to turn it over this over, they should
16:33:21 25 concede that the evidence should be suppressed. That is

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16:33:23 2 the option that they should have that we just won't use
16:33:27 3 the evidence if it's got to be turned over. And if the
16:33:30 4 Court determines that it's going to be turned over just
16:33:33 5 for eyes only, we don't object to that. But the eyes
16:33:38 6 only would include our client, not just the attorney.
16:33:40 7 We have to, obviously, be able to discuss this.

16:33:42 8 MAGISTRATE JUDGE ROEMER: So you disagree
16:33:44 9 with Mr. LaTona.

16:33:45 10 MR. HARRINGTON: I do. Our clients have to
16:33:47 11 be able to see it, because they have to participate with
16:33:51 12 us in the preparation of the motion. And the protective
16:33:55 13 order would apply to them, too and, I mean, there is no
16:33:58 14 reason in the record here that we have that Mr.
16:34:02 15 Bongionvanni would not comply with any direction like
16:34:05 16 this. But, Judge, the difficulty here is that,
16:34:16 17 especially with search warrant suppression motions, is
16:34:21 18 that with *Leon* and other decisions that have come along,
16:34:25 19 it gets harder and harder to make constitutional
16:34:28 20 challenges to search warrants. Now, whether Jim
16:34:32 21 Harrington agrees with the rationale, that doesn't
16:34:35 22 really matter. It's up to you and up to your higher
16:34:38 23 courts to determine whether those decisions are the
16:34:42 24 right decisions. And that is what you have to follow.
16:34:48 25 But, the fundamental principle of the Fourth Amendment

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16:34:51 2 is that we need to have the opportunity to make whatever
16:34:56 3 arguments we can. Whether we fall short or not is not
16:34:59 4 the issue here. The issue is what are we going to
16:35:03 5 receive and when are we going to receive it. And why
16:35:08 6 does the government fight so hard about this issue? Why
16:35:12 7 are they so hell bent on denying an individual facing a
16:35:18 8 severe sentence in prison if he is convicted with being
16:35:21 9 able to argue his fundamental rights that are written in
16:35:24 10 the Constitution? It's not only implausible, it's
16:35:29 11 really shameful. Thank you.

16:35:32 12 MAGISTRATE JUDGE ROEMER: Thank you, sir.
16:35:33 13 Mr. Tripi?

16:35:34 14 MR. TRIPI: Yes, Judge. The defendants
16:35:40 15 concede in their filings that defense doesn't have a
16:35:43 16 right to per se inspect search warrant affidavits. So
16:35:46 17 we agree on that. And, obviously, it takes a
16:35:51 18 case-by-case basis. Now, in this -- in these particular
16:35:55 19 cases, the two, what I'll characterize for purposes of
16:36:00 20 this discussion, main search warrants are 195154, the
16:36:04 21 Bongiovanni search warrant at 85 Alder Place; and
16:36:10 22 195303, which was under 99 Aero Drive and the Lexor Lane
16:36:16 23 residence relating to Mr. Gerace. This Court issued
16:36:21 24 those warrants. So, we're not in a situation where you
16:36:26 25 don't know the scope, the direction and the vast amounts

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16:36:33 2 of information that was supplied in conjunction with
16:36:36 3 those warrants in how unsealing that information or
16:36:39 4 making it available to defense attorneys would impact a
16:36:42 5 number of people and impact ongoing investigations.
16:36:45 6 We've been very clear in every setting that the
16:36:48 7 investigation is ongoing. And you know from your review
16:36:51 8 of those affidavits how robust that investigation is.
16:36:56 9 So when I say those things, I'm not saying them in a
16:36:59 10 vacuum that this Court has no context for comparison.
16:37:02 11 You have hundreds and hundreds of pages of materials and
16:37:09 12 attachments appended to those exhibits. I will go into
16:37:14 13 a little bit of detail for purposes of the discussion.
16:37:16 14 But on the outset, I'll rely, principally, on my
16:37:23 15 briefing on standing. The point was to walk through the
16:37:32 16 analysis: Standing, materiality, and then what is the
16:37:37 17 remedy. That was the purpose of the briefing in going
16:37:40 18 through that exercise. We've heard two sets of counsel,
16:37:47 19 who I respect, say "Mr. Tripi knows," essentially, whose
16:37:53 20 phone is whose or whose premises we searched at 999 Aero
16:38:01 21 Drive. What the government believes and what the
16:38:04 22 government alleges in an indictment is no substitute for
16:38:07 23 a defendant clearly and consciously asserting their
16:38:12 24 Fourth Amendment rights. And to varying degrees, that
16:38:17 25 wasn't done here. Despite the government's briefing,

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16:38:23 2 replies didn't come that made it any clearer. If the
16:38:27 3 standard was what the government believes, then we would
16:38:30 4 be at a sentencing right now. We wouldn't be talking
16:38:33 5 about disclosure issues. So you can't use what the
16:38:36 6 government believes when it benefits you and then not
16:38:41 7 when it doesn't. You can't use constitutional rights as
16:38:44 8 shields and swords.

16:38:46 9 But if we look at these two affidavits, and
16:38:49 10 these are the main affidavits, the other ones are
16:38:51 11 incorporated in by reference to the other ones.
16:38:56 12 Referring to the Bongiovanni affidavit, because it's how
16:39:03 13 I have it in my notes here, 195154, I would say there is
16:39:08 14 over a dozen of sources in that affidavit, over a dozen.
16:39:13 15 You know how useless that would be if we redact all of
16:39:28 16 that information to the defense? There is no way to
16:39:31 17 appropriately shield the people, or to put forth the
16:39:35 18 information without identifying the people. And, of
16:39:37 19 course --

16:39:38 20 MAGISTRATE JUDGE ROEMER: Well, that really
16:39:39 21 is your argument, right? The fact you say it's useless
16:39:42 22 to the defendant, the defendant don't care about that.
16:39:58 23 They say, "I'll take whatever I can get." Your point is
16:40:05 24 there is no way to redact it without revealing the
16:40:08 25 identities of the people.

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16:40:09 2 MR. TRIPI: And redaction was going to the
16:40:11 3 last point I was going to address. But, yes, you have
16:40:14 4 over a dozen sources. I'm approximating, Judge. But,
16:40:18 5 then there is other evidence outlined in there. I'll
16:40:21 6 point to some of it. There is references, as you know,
16:40:23 7 to text messaging between Gerace and Bongiovanni. The
16:40:27 8 raw data has been supplied in discovery and it's
16:40:33 9 referenced in the indictment. You don't need that to
16:40:35 10 prepare.

16:40:36 11 MAGISTRATE JUDGE ROEMER: You're saying the
16:40:38 12 actual text messages themselves?

16:40:39 13 MR. TRIPI: The actual text messages have
16:40:42 14 been provided, and some of those are referenced right in
16:40:54 15 the indictment. So when you're evaluating for
16:40:56 16 materiality, search warrant affidavit is not material
16:41:00 17 for that type of information. They have the raw
16:41:02 18 materials in discovery. Search warrant affidavit
16:41:06 19 references a DEA-6 written by Bongiovanni, November 6th,
16:41:11 20 2009. They have it, produced in discovery, that
16:41:16 21 document. And it's also referenced in the indictment.
16:41:19 22 When you evaluate materiality, you don't need the search
16:41:22 23 warrant affidavit for that. There were inner office
16:41:28 24 memos drafted by Bongiovanni in November of 2018,
16:41:32 25 December 2018 and January of 2019, DEA internal memos.

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16:41:37 2 All of those were produced in discovery and are
16:41:40 3 referenced in the indictment. In fact, they form the
16:41:43 4 basis of several of the obstruction counts; three to be
16:41:46 5 exact. There is an OIG interview of Bongiovanni
16:41:51 6 referenced in that affidavit from March 29th, 2019.
16:41:55 7 They have the ROI report of information, DOJ OIG
16:42:00 8 generated, and that interview is referenced in the
16:42:06 9 indictment. Defendant is alleged to have made false
16:42:09 10 statements during that interview. So, those types of
16:42:13 11 things, they already have. The rest of the affidavit,
16:42:18 12 you'll know when you review it, and you consider what
16:42:22 13 we're asking here, talks about the scope, the ongoing
16:42:26 14 nature of the investigation, other subjects and targets
16:42:29 15 who are not yet charged, and, of course, specifically
16:42:32 16 identifies more than a dozen people who are sources of
16:42:37 17 information, informants or potential trial witnesses.
16:42:42 18 So, we've made our compelling showing. It's there. And
16:42:48 19 they haven't made a materiality showing. The law is
16:42:53 20 clear. I want to make a *Franks* motion is not
16:42:56 21 materiality. Materiality is viewed from the
16:43:00 22 government's case in chief and the trial evidence. They
16:43:02 23 have it. And anyone that is called as a witness, they
16:43:05 24 will be able to cross examine. In fact, the affiant,
16:43:09 25 Special Agent Curtis Ryan, if he is called as a witness

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16:43:13 2 whenever trial is, his affidavit will be on the table
16:43:15 3 for disclosure or protective order at that time when
16:43:19 4 we're at district court with a firm trial date. And if
16:43:22 5 we have to fight about redactions then for people that
16:43:25 6 are not going to testify or what have you, we can do it
16:43:28 7 at that time.

16:43:31 8 MAGISTRATE JUDGE ROEMER: What about
16:43:35 9 attorney and client's eyes only? Why is that no good?

16:43:37 10 MR. TRIPI: That won't be any good because
16:43:40 11 we've already had a mistake. We've already had a
16:43:42 12 mistake with the protective order. And we all make
16:43:46 13 mistakes. Everyone is trying their level best. We put
16:43:50 14 some information in the hands of the defense. It ended
16:43:54 15 up on the public docket and this Court had to take
16:43:58 16 corrective measures. That can't happen here.

16:44:01 17 MAGISTRATE JUDGE ROEMER: And this is,
16:44:02 18 probably, you will consider a silly question, but I
16:44:04 19 always ask it of the government. You did find evidence
16:44:09 20 at these locations that you're going to use at trial,
16:44:11 21 right?

16:44:12 22 MR. TRIPI: Yes.

16:44:13 23 MAGISTRATE JUDGE ROEMER: Because I have had
16:44:14 24 it where I've asked the government, we're fighting about
16:44:17 25 this, do you actually have evidence you're going to use

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16:44:19 2 and they didn't.

16:44:21 3 MR. TRIPI: Yes. We're not wasting our
16:44:23 4 time. As laid out in the indictment, a box of DEA
16:44:26 5 materials regarding the file that the bribes were
16:44:29 6 allegedly being paid were recovered in Bongiovanni's
16:44:34 7 basement. So we're definitely introducing evidence from
16:44:38 8 each of the searches.

16:44:39 9 MAGISTRATE JUDGE ROEMER: And, what, you
16:44:40 10 have got information from Pharaoh's, is that in the form
16:44:43 11 of business records or something?

16:44:44 12 MR. TRIPI: Some business records there.
16:44:46 13 There is a little bit of drug paraphernalia. Drug labs
16:44:49 14 have been provided regarding the drug evidence from a
16:44:52 15 locker room area, I believe.

16:44:55 16 MAGISTRATE JUDGE ROEMER: And what about his
16:44:57 17 residence?

16:44:58 18 MR. TRIPI: There is some documents as well
16:45:00 19 that we would utilize.

16:45:01 20 MAGISTRATE JUDGE ROEMER: Okay. I know it
16:45:03 21 sounds silly, I've had it, no, we're not using any of
16:45:06 22 the evidence and why are we here.

16:45:08 23 MR. TRIPI: I understand, your Honor. And
16:45:09 24 all of the stuff that has been found, there have been
16:45:12 25 reports itemizing it, photographs provided, and we can

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16:45:16 2 make any physical items available for inspection as
16:45:16 3 well.

16:45:21 4 The search warrant, 19M1065, if I could just
16:45:29 5 --

16:45:29 6 MAGISTRATE JUDGE ROEMER: Let's go back to
16:45:30 7 Mr. Bongionvanni and the phone. Do you not know which
16:45:34 8 phone is his or --

16:45:36 9 MR. TRIPI: We have a belief. We have --

16:45:39 10 MAGISTRATE JUDGE ROEMER: You want a
16:45:40 11 statement from him, "this is my phone."

16:45:41 12 MR. TRIPI: Correct. And if we're correct,
16:45:43 13 then he satisfied the standing part for sure. And Mr.
16:45:50 14 Harrington is right, I do have a belief, but the law, I
16:45:53 15 would suggest, requires him to say, "this is my phone,
16:45:56 16 I'm not moving against these other devices," or just
16:45:59 17 tell us which one he is moving under.

16:46:08 18 You know, and the defense hasn't even
16:46:11 19 scratched the surface. Neither have argued materiality.
16:46:15 20 I think Mr. Harrington said a few moments ago there are
16:46:18 21 potential motions we could make if we had this
16:46:22 22 information. Submit that to you by sealed affidavit.
16:46:26 23 Lay out for you what the materiality is if they don't
16:46:30 24 want to tell me. They haven't attempted to do any of
16:46:33 25 that. They just want it because they want it because

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16:46:36 2 it's helpful. Sure it's helpful. It will identify a
16:46:40 3 bunch of witnesses early and then we'll struggle to get
16:46:46 4 those people potentially to the stand.

16:46:50 5 Turning to the Gerace 195303, I'll focus on
16:47:02 6 that because that is the main one.

16:47:04 7 THE COURT: It's more helpful if you tell me
16:47:06 8 the locations.

16:47:07 9 MR. TRIPI: Locations 9 99 Aero Drive and
16:47:10 10 5154 (sic) Lexor Lane.

16:47:12 11 MAGISTRATE JUDGE ROEMER: Okay.

16:47:13 12 MR. TRIPI: That one has even more witnesses
16:47:25 13 in it than the Bongiovanni. There is some overlap, but
16:47:28 14 there are some differences who would be identified by
16:47:33 15 name, by content. Defense spent a lot of time and
16:47:38 16 energy on the person, the ex-wife, who outed herself in
16:47:41 17 the paper. Not a person who is among any of the
16:47:45 18 witnesses who contributed to probable cause for these
16:47:47 19 search warrants. So they wasted some paper there.

16:47:56 20 Again, the government's interest is
16:47:58 21 compelling. Its evident from the warrants that you
16:48:00 22 reviewed and sealed the first time, and the Gerena case
16:48:27 23 was cited for the proposition that, by the government,
16:48:38 24 that the defense can't rely on the government's
16:48:41 25 allegations. That is clear law. We could have cited a

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16:48:44 2 dozen other cases or more for that proposition. The
16:48:47 3 language used by Mr. LaTona, "colorable claim," that is
16:48:52 4 not in the opinion, that is Mr. LaTona talking. That is
16:48:54 5 what he wants you to think the case supports. The
16:48:58 6 defendants have to assert their constitutional rights.
16:49:02 7 That is clear Hornbook law. That is clear. Hasn't been
16:49:05 8 done here. Unless you want to hold what is said by a
16:49:08 9 shareholder, that the gentlemen's club located at 999
16:49:19 10 Aero Drive is and has been operated by Pharaoh's GC,
16:49:27 11 Inc., a corporate entity, that is what he said. "Since
16:49:31 12 April 2019, I've been the sole shareholder in that
16:49:35 13 corporate entity. And I'm in the process of acquiring
16:49:37 14 title." That is enough. I'm in the process of trying
16:49:41 15 to lose weight, I haven't. It's irrelevant. So, then
16:49:47 16 the law that I cited with respect to shareholders
16:49:50 17 applies, *Chuang*, 897 F. 2d 646, the Court held that a
16:49:58 18 bank officer had no expectation of privacy in another's
16:50:11 19 work space notwithstanding his operational control over
16:50:14 20 the bank. So, establish standing first in the 99 Aero
16:50:23 21 Drive, he has it. But the sum total of Gerace's
16:50:29 22 territorial claim is that the government's argument is
16:50:31 23 ludicrous, that argument shouldn't carry the day in any
16:50:34 24 court in America on any day in America. That is the
16:50:39 25 My-Cousin-Vinny-everything-this-guy-said line. That

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16:50:41 2 shouldn't fly.

16:52:04 3 The Gerace application incorporates the
16:52:07 4 Bongiovanni affidavit that we just discussed,
16:52:11 5 incorporates search warrants issued for two other
16:52:13 6 locations, which I won't identify in this setting, which
16:52:18 7 are identified clearly in the application. Incorporates
16:52:20 8 another search warrant for a Yahoo account relates to
16:52:27 9 Bongiovanni. And incorporates the indictment which is
16:52:29 10 publically available. There has not been a sentence
16:52:33 11 uttered regarding the materiality other than the fact
16:52:36 12 that it would help them learn the witnesses, even if
16:52:40 13 redacted, and all of the other things relate to the
16:52:42 14 nature and scope of the government's investigation.
16:52:45 15 Again, all of the underlying information from the
16:52:48 16 searches has been provided. All of the items seized
16:52:51 17 from the searches referenced in the attachments, so the
16:52:55 18 other searches for other search warrants, that evidence
16:53:00 19 has been provided so they won't be coming out of left
16:53:03 20 field when this is set for trial. And that was some of
16:53:07 21 the information that made its way into a public filing,
16:53:09 22 your Honor.

16:53:14 23 So, the *Abuhamra* case, I mean, I'm not going
16:53:18 24 to belabor that. I think you were rightly the law clerk
16:53:22 25 for Judge Arcara in that decision. It was a bail

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16:53:24 2 setting and the defendant had no opportunity to meet the
16:53:27 3 government's allocutions in the bail setting; totally
16:53:43 4 distinguishable. They have a whole superseding
16:53:47 5 indictment to review our allegations here. They are
16:53:49 6 going to get -- they already have the underlying
16:53:52 7 evidence seized from these warrants and warrants that
16:53:55 8 were incorporated into these warrants and they are going
16:53:58 9 to get the witness statements as *Jencks* Act material
16:54:01 10 before trial when that protective order gets nailed out
16:54:06 11 down the road once we have a date certain from Judge
16:54:09 12 Sinatra and we know where we're going with this. Again,
16:54:12 13 "I want to make a *Franks* motion," does not establish
16:54:17 14 materiality.

16:54:18 15 That is all I have. Thank you, Judge.

16:54:20 16 MAGISTRATE JUDGE ROEMER: Thank you, Mr.
16:54:21 17 Tripi.

16:54:21 18 Mr. Harrington, you want to reply?

16:54:24 19 MR. LATONA: Judge, I made a comment to you
16:54:26 20 before in my argument about the government making
16:54:28 21 elections when they file applications for search
16:54:31 22 warrants. And Mr. Bongionvanni (sic) just told us that
16:54:33 23 he had 12 sources that are in this application for a
16:54:36 24 search warrant.

16:54:36 25 MAGISTRATE JUDGE ROEMER: Mr. Tripi.

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16:54:38 2 MR. HARRINGTON: Tripi, I'm sorry. Mr.
16:54:41 3 Tripi. What does that tell us? Does that tell us that
16:54:45 4 the application was weak? Does that tell us that he had
16:54:49 5 to overdo it? They make certain choices when they do
16:54:54 6 things. This is an example of what I'm talking about.
16:54:56 7 Did you need 12 sources in order to get a search warrant
16:55:00 8 to search somebody's house where you believe that the
16:55:02 9 person has evidence in the house? You need 12 sources
16:55:07 10 to do that? And if you have 12, take the names out of
16:55:11 11 it for now. The names are not really the issue that
16:55:15 12 we're worried about now. We need to know what the
16:55:18 13 factual premise of it is. And Mr. Tripi, very cleverly,
16:55:23 14 tried to tell you that we have discovery which are
16:55:27 15 things that were attached to or mentioned in the search
16:55:29 16 warrant affidavits. So what? How do I know that what
16:55:35 17 is in the search warrant affidavit, other than what he
16:55:38 18 just told me. I don't know the text messages were
16:55:41 19 there. I don't know the memorandum or anything else was
16:55:43 20 in there. I don't know. I have them, but I didn't know
16:55:46 21 they were in the application. That is not fair. I
16:55:49 22 would like to have Thomas Jefferson and the other people
16:55:52 23 who wrote the amendments to the Constitution sit here
16:55:55 24 and listen to this.

16:55:58 25 Materiality, you got a search warrant, you

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16:56:01 2 come to my house, you take evidence. I want to suppress
16:56:05 3 it because I believe that you acted improperly. So show
16:56:09 4 me what you base that on and let me make my motion and
16:56:12 5 rise or fall with the Court. It's material. You want
16:56:15 6 to use it as evidence. I've satisfied materiality. And
16:56:20 7 he says, oh, guess what, at the time of trial with the
16:56:23 8 Jencks Act, we'll turn it over to you then. For what?
16:56:27 9 For cross examination of witnesses. What happens if he
16:56:30 10 turns it over then and we say, you know, what we said
16:56:33 11 back in June to Judge Roemer has been borne out now that
16:56:38 12 we've got this. What do we say then? We say to the
16:56:41 13 trial judge, we say to Judge Sinatra, and guess what,
16:56:44 14 Judge, can you reopen this and give us a suppression
16:56:47 15 hearing when you got a trial scheduled in two weeks or a
16:56:50 16 month or send it back to Judge Roemer? Do you think
16:56:53 17 that is going to happen? It's not going to happen. And
16:56:56 18 it's wrong and this is a horrible slippery slope that
16:57:00 19 we're on the path toward.

16:57:03 20 And Mr. Tripi threw a shot at me that there
16:57:06 21 was a mistake made before. Apparently the premise of
16:57:10 22 that is that I can't be trusted. All right. And he
16:57:14 23 couches it with, well, I'm not really saying anything.
16:57:18 24 But that is what he is saying. And he pointed it out to
16:57:21 25 me when my office made the mistake, and I take

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16:57:23 2 responsibility for that. I did. And as soon as he told
16:57:27 3 me, what did I do? I went to you to correct it. Okay?
16:57:31 4 And it was a mistake. And I'm pledging to you that I
16:57:36 5 may make other mistakes. But they are not going to be
16:57:39 6 intentional, and, especially, with something as
16:57:42 7 sensitive as this where if you issue another protective
16:57:46 8 order with this, we will make sure that it doesn't
16:57:49 9 happen again in our office. And we've already had a
16:57:51 10 meeting about it in our office to make sure it doesn't
16:57:54 11 happen again. And I fall on my sword. I admit anything
16:58:00 12 I do wrong. But Mr. Tripi is implying now I can't be
16:58:15 13 trusted. You make that decision. You've known me 20 or
16:58:18 14 30 years, and you make the decision of whether I can be
16:58:21 15 trusted.

16:58:22 16 But, Judge, Mr. Tripi's arguments, it seems
16:58:24 17 to me of all of the information that we have has nothing
16:58:28 18 whatsoever to do with whether we can challenge the
16:58:32 19 search warrant. And if the search warrant application
16:58:34 20 is 100-pages long, there may be one sentence, there may
16:58:39 21 be one page, there may be 10 items rather, 100 pages of
16:58:42 22 items that lead to a suppression motion, but we have to
16:58:45 23 have it in order to know that. Thank you.

16:58:47 24 MAGISTRATE JUDGE ROEMER: Thank you, sir.

16:58:48 25 Mr. LaTona?

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16:58:51 2 MR. TRIPI: Judge, can I just respond?

16:58:53 3 MAGISTRATE JUDGE ROEMER: Let's do it at one
16:58:55 4 time.

16:58:55 5 MR. TRIPI: I wasn't implying Mr.
16:58:58 6 Harrington's integrity at all. I said it was a mistake.
16:59:01 7 That is all it was.

16:59:03 8 MR. LATONA: Judge, if I can, Mr. Tripi made
16:59:06 9 an allegation that I basically fabricated an issue in
16:59:11 10 Gerena talking about a "reasonable colorable claim." I
16:59:13 11 want to read from the decision itself. This is at 662 F
16:59:21 12 Supp page 1238, and I quote, "A defendant establishes a
16:59:28 13 colorable standing claim by alleging sufficient facts to
16:59:32 14 create a reasonable impression with the court of the
16:59:37 15 objective rationality (under the above standard) of his
16:59:45 16 or her professed subjective privacy allegations. If the
16:59:50 17 government reasonably contests such a claim, the
16:59:54 18 defendant is entitled to a hearing where he or she is
16:59:58 19 required to prove facts necessary to support his or her
17:00:03 20 professed subjective expectations and the overall
17:00:06 21 reasonableness of his or her position." Now, there is a
17:00:11 22 footnote 24 when it talks about the government
17:00:15 23 reasonably contests such claim. Footnote 24 of the
17:00:20 24 court's opinion: "As stated, the government's objection
17:00:25 25 must be reasonable. The Court would not permit the

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17:00:29 2 government to contest standing solely for the purpose of
17:00:33 3 making defendants go to the trouble of proving standing
17:00:37 4 when, in fact, no serious question of standing exists.
17:00:43 5 The government, however, has in no way attempted to
17:00:47 6 harass the defendants in this matter." This court says
17:00:51 7 that when they are trying to contest an issue about
17:00:54 8 which the facts are clear, that is harassment.

17:00:58 9 Number two, he claimed that we made no
17:01:00 10 showing regarding materiality. I invite your Honor's
17:01:04 11 attention to page five of our Reply Memorandum, which
17:01:08 12 quotes Rule 16 about any item material to preparing the
17:01:15 13 defense. I also cite an Eighth Circuit case that
17:01:20 14 acknowledges the following search warrants are at the
17:01:26 15 center of pretrial suppression hearings and suppression
17:01:29 16 issues often determine the outcome of criminal
17:01:33 17 prosecutions. Clearly anything regarding a defendant's
17:01:37 18 exertion of his Fourth Amendment rights falls within the
17:01:40 19 materiality portion of that section. The other thing
17:01:43 20 about an "eyes only," and I just want to clarify, if I
17:01:48 21 wasn't articulate. "Eyes only" means the document
17:01:51 22 itself. I think the defense lawyer either in any sort
17:01:56 23 of an order should have the ability to interview
17:02:00 24 individuals, maybe his client, maybe third parties, who
17:02:03 25 might have information as to the truth or falsity of

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17:02:05 2 what's in those allegations. I'm just talking about the
17:02:09 3 document myself. Now, he went on about ongoing --

17:02:13 4 THE COURT: So you're saying only you would
17:02:15 5 see the document, but you could discuss it with your
17:02:18 6 client?

17:02:18 7 MR. LATONA: Exactly, or any other person
17:02:21 8 that would have material evidence that could be relevant
17:02:24 9 to further motions or that should be brought on behalf
17:02:27 10 of the client. But unless we investigated, we're not
17:02:30 11 going to know. You know, this ongoing investigation,
17:02:33 12 I've cited a number of cases that talk about when it
17:02:36 13 goes that long, forget about it. Okay? I mean, they
17:02:40 14 had ample opportunity to interview anybody they wanted,
17:02:43 15 put them in the grand jury or indict anybody that they
17:02:46 16 claim did anything wrong. I'm doing investigations and
17:02:50 17 some of the cases I cited say that you could say it
17:02:54 18 about any case. In any case, you know, there could be
17:02:58 19 witness intimidation. You know, Judge, it doesn't fly
17:03:01 20 and it doesn't fly at this stage in the litigation. If
17:03:05 21 they are going to act in good faith, they better provide
17:03:15 22 specific allegations justifying what it is they want to
17:03:20 23 keep secret, and they should present it to this Court
17:03:23 24 and they should have any item that purportedly
17:03:27 25 corroborates what they claim as well. You talk about a

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17:03:31 2 text message, give it to the Court to see, A, if it
17:03:34 3 exists or not, okay? Or two, what it indicates, what it
17:03:38 4 says. And the situation, we made it very clear, Judge,
17:03:43 5 that we were not relying only on governmental
17:03:46 6 investigations and on standing, that was very clear from
17:03:50 7 *Gerena*, but there is other information and material that
17:03:52 8 we put forth, and, basically, that is the situation that
17:03:55 9 we have in terms of responding to what Mr. Tripi had to
17:03:59 10 say.

17:03:59 11 MAGISTRATE JUDGE ROEMER: Thank you, sir.

17:04:01 12 MR. TRIPI: Well, now I made a mistake
17:04:02 13 because the words "colorable" and "claim" were in the
17:04:07 14 *Gerena* opinion. So fair point by Mr. LaTona on that.
17:04:10 15 But that said, our standing arguments remain. He still
17:04:16 16 hasn't gave specific allegations that would rise to the
17:04:21 17 level of a Fourth Amendment. And *Gerena* is only
17:04:24 18 persuasive authority anyway.

17:04:28 19 What he just proposed was that defense
17:04:33 20 counsel gets to read the sealed applications under a
17:04:36 21 protective order and then they could verbally transmit
17:04:39 22 it to their client. That is totally and wholly
17:04:41 23 inadequate. And the materiality argument on page five
17:04:51 24 is less than one page, it cites the conclusory phrasing
17:04:56 25 of Rule 16(a)(1)(E), calls the government's position

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17:05:02 2 ludicrous and then cites to an Eighth Circuit case, *In*
17:05:07 3 *Re Search Warrant for the Secretarial Area*, and it
17:05:10 4 plucked one quote out of that opinion. Want to know
17:05:13 5 what that case was about? It was, first, in that case,
17:05:18 6 the circuit affirmed the sealing and the district
17:05:24 7 court's decision to keep the search warrant materials
17:05:28 8 sealed. It addressed the newspaper's First Amendment
17:05:31 9 right of access claim. It said that the right of access
17:05:43 10 cedes to a government compelling interest, which is what
17:05:45 11 we have here. And, in that case, the government
17:05:49 12 demonstrated that continued sealing was warranted due to
17:05:55 13 ongoing investigation. The circuit, Eighth Circuit,
17:06:03 14 said, "These documents described in considerable detail
17:06:13 15 the nature, scope and direction of the government
17:06:16 16 investigation and the individuals and specific projects.
17:06:21 17 Government investigation would be severely compromised
17:06:26 18 by the unsealing." That is exactly what would happen in
17:06:30 19 this case. Thank you.

17:06:32 20 MAGISTRATE JUDGE ROEMER: Okay. I'm going
17:06:33 21 to go ahead and issue my decision. Defendant Peter
17:06:37 22 Gerace moves to unseal the applications of federal
17:06:40 23 warrants to search his residence at 5145 Lexor Lane,
17:06:44 24 Clarence, New York on November 29th, 2019, and February
17:06:50 25 26th, 2021; a federal warrant to search Pharaoh's

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17:06:54 2 Gentlemen's Club, 999 Aero Drive Cheektowaga on November
17:06:58 3 29th, 2019; and a federal warrant to search a cell phone
17:07:12 4 seized from him on February 28th, 2021. Defendant
17:07:16 5 Joseph Bongiovanni moves to unseal the applications for
17:07:19 6 federal warrants to search him and his residence at 85
17:07:25 7 Alder Place, Kenmore, New York on June 6th, 2019; and a
17:07:28 8 federal warrant to search electronic devices seized from
17:07:32 9 him and his residence that same day. The government
17:07:45 10 contends that Bongiovanni has not established standing
17:07:48 11 to challenge the search of the device, and Gerace has
17:08:02 12 not established standing to challenge a search of
17:08:04 13 Pharaoh's Gentlemen Club. Regardless of whether
17:08:07 14 standing has been established, the Court finds no basis
17:08:11 15 to grant the defendants' motion to unseal the
17:08:12 16 applications for the federal search warrants issued in
17:08:15 17 this case. The sealed warrant applications provide
17:08:18 18 extensive and detailed information about the
17:08:20 19 government's ongoing investigation of this matter,
17:08:22 20 including information regarding cooperating witnesses
17:08:25 21 who testified before the grand jury. The government
17:08:28 22 represents that even if the witness' names were
17:08:30 23 redacted, sufficient information would be named to
17:08:34 24 identify them. The government also proffers that one
17:08:37 25 ongoing aspect of the investigation is witness

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intimidation. Defendants will receive information about government witnesses, including their statements and other impeachment material prior to the trial and in accordance with the district court's scheduling order. In fact, the government is not required to disclose any of the witnesses or the identity of the informants at this stage. The proceeding, *Roviaro v. United States* 353 U.S. 53, 1957, while defendants argue that unsealed applications are necessary to file suppression motions, the court may conduct an in camera review of the search warrant applications should the defendants move to suppress any evidence based on the insufficient or lack of probable cause in the federal search warrants. Moreover, there is no evidence before the Court that suggests that the warrants were based on deliberately or recklessly false or misleading information. Thus, the Court finds any interest that the defendants have in reviewing the sealed search warrant applications is outweighed by the government's significant interest in protecting the integrity of the investigation and the identity of the informants. See *United States v. Pirk*, 282 F Supp 3d, 585 Western District of New York 2017. *United States v. Saltares*, 301 F. Supp 2d 305, Southern District of New York, 2004. There the Court denied

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17:10:53 2 defendant's request to unseal search warrant affidavits
17:10:55 3 that determine whether the warrant was subject to
17:10:58 4 probable cause challenge because the government had a
17:11:00 5 high interest in protecting informants' identity and
17:11:04 6 there was no showing that the affidavits were material
17:11:15 7 to the defense.

17:11:17 8 The Court notes that with respect to the
17:11:19 9 search warrant for the cell phone seized from Gerace on
17:11:23 10 February 28th, 2021, the government has provided the
17:11:27 11 defendant with a redacted copy of the application,
17:11:31 12 affidavit and attachments. All remaining aspects of the
17:11:36 13 defendants' motion to unseal the warrant applications
17:11:38 14 are denied.

17:11:39 15 Now, I note that the pretrial motions are to
17:11:41 16 be filed by July 7th. Mr. Harrington, you filed motions
17:11:48 17 already, but I believe you said you wanted the
17:11:50 18 opportunity to file additional motions if you thought
17:11:54 19 necessary, correct?

17:11:55 20 MR. HARRINGTON: Yes, Judge.

17:11:56 21 MAGISTRATE JUDGE ROEMER: So, you'll have
17:11:57 22 them filed by July 7th. All right?

17:11:59 23 Mr. LaTona?

17:12:00 24 MR. LATONA: Your Honor, I talked to Mr.
17:12:07 25 Daniels. Judge, we're going to appeal your ruling. I

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17:12:10 2 presume we'll get it in writing.

17:12:12 3 MAGISTRATE JUDGE ROEMER: No, you can order
17:12:14 4 a copy of the transcript and then you can appeal.

17:12:17 5 MR. LATONA: That's fine, Judge. What we're
17:12:19 6 requesting is, until Judge Sinatra ultimately decides
17:12:23 7 our appeal, we would like to have the motion deadline
17:12:27 8 and motion schedule put in abeyance so that we can
17:12:32 9 include all materials that may be forthcoming from Judge
17:12:36 10 Sinatra, maybe not, but we would like to put everything
17:12:38 11 on hold regarding scheduling.

17:12:40 12 MR. TRIPI: I would like to proceed on the
17:12:43 13 schedule that we have. And if later the district court
17:12:48 14 disagrees with this Court, I'm sure this Court or Judge
17:12:53 15 Sinatra will give additional time to file motions
17:12:55 16 directed at the search warrants if they are able to
17:12:58 17 prevail before the district court.

17:13:00 18 MR. LATONA: Well, he is not here and I
17:13:02 19 don't know why we should read in things. I think it's
17:13:06 20 reasonable.

17:13:06 21 MAGISTRATE JUDGE ROEMER: I understand your
17:13:08 22 position and I'll deny your applications. Push forward
17:13:11 23 with your motions. If at some point he disagrees with
17:13:14 24 me and you think there is a basis for filing additional
17:13:17 25 motions, we'll certainly make room for that to happen.

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17:13:19 2 This case is already kind of old and I want to keep
17:13:22 3 pushing it forward. Okay?

17:13:24 4 MR. TRIPI: Thank you, Judge.

17:13:27 5 MR. HARRINGTON: Judge?

17:13:27 6 MAGISTRATE JUDGE ROEMER: Yes, sir.

17:13:28 7 MR. HARRINGTON: With respect to Mr.
17:13:29 8 Bongiovanni's motions for his cell phone?

17:13:32 9 MAGISTRATE JUDGE ROEMER: Yes.

17:13:32 10 MR. HARRINGTON: Are you denying him his
17:13:34 11 motion for his own cell phone seeing the fact that there
17:13:39 12 is question about which one there is. We can clear that
17:13:41 13 up very quickly. He, Mr. Tripi, has not turned over
17:13:46 14 anything like he has for Mr. Gerace, like he has with
17:13:50 15 respect to the cell phone, and, apparently, has no
17:13:52 16 intention of doing so.

17:13:53 17 MR. TRIPI: It's different because the
17:13:55 18 search warrant that you've ordered remains sealed is
17:14:00 19 incorporated into the cell phone search warrant
17:14:03 20 affidavit, so we don't intend to provide that because it
17:14:08 21 would provide the larger affidavit.

17:14:12 22 MAGISTRATE JUDGE ROEMER: Okay. Yes, so
17:14:13 23 you're correct, Mr. Harrington, I'm not ordering that be
17:14:16 24 disclosed. Okay. Anything else, Mr. Tripi?

17:14:19 25 MR. TRIPI: No, your Honor.

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17:14:19 2 MAGISTRATE JUDGE ROEMER: Mr. LaTona?

17:14:20 3 MR. LATONA: No, Judge.

17:14:21 4 MAGISTRATE JUDGE ROEMER: Mr. Harrington?

17:14:23 5 MR. HARRINGTON: No.

17:14:23 6 MAGISTRATE JUDGE ROEMER: Have a good rest

17:14:24 7 of the day.

8 * * *

9 CERTIFICATE OF REPORTER

10

11 I certify that the foregoing is a correct transcript
12 of the record of proceedings in the above-entitled
13 matter.

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15 S/ Karen J. Clark, RPR

16 Official Court Reporter

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